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No 84-746

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

MARIA GUADALUPE NAVARRO,

Appellant,

v.

AGRICULTURAL LABOR RELATIONS BOARD, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Appellees.

On Appeal From The California Court of Appeal, First Appellate District, Div.2

APPELLEE'S MOTION TO DISMISS

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Dated: 7 December 1984

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QUESTION PRESENTED

1. Does the California Legislature's failure, when it enacted the State's Agricultural Labor Relations Act, to prohibit private union shop, union security agreements which were permitted under the State's pre-Act common-law, constitute "state action" sufficient to invoke the Fourteenth Amendment?

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No. 84-739

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SUPREME COURT OF THE UNITED STATES

MARIA GUADALUPE NAVARRO

Appellant,

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AGRICULTURAL LABOR RELATIONS BOARD, and UNITED FARM WORKERS OF AMERICA, AFL-CIO,

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On Appeal from the California Court of Appeal, First Appellate District, Division Two

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APPELLEE'S MOTION TO DISMISS

Appellee United Farm Workers of America, AFL-CIO (UFW or Union), pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal

on the following grounds:

1. The appeal does not present a substantial federal question.

2. The Decision and Order of the California Court of Appeal correctly decided all issues properly before the Court.

COUNTER-STATEMENT OF THE CASE

California, like most of the States, took no action to afford its agricultural workers collective bargaining rights when Congress' 1935 enactment of the National Labor Relations Act (NLRA), 49 Stat. 477, excluded such workers from its protections. (29 U.S.C.§2(3).) Thus, for forty years following the federal enactment that assured industrial workers the rights to organize and elect exclusive union representatives and compelled employers to engage in good faith collective bargaining with unions selected by a worker majority (29 U.S.C.§§157-159), California farm workers were left to their own meager devices.

The workers are primarily migrants and their employment, seasonal. A "significant number read and understand only Spanish, Filipino, or other languages from India or the Middle East".[2] Wages have been uniquely low and fringe benefits, practically nonexistent.[3] Organizing efforts were historically met with crippling injunctions that effectively destroyed any possibility of winning union contracts or other concessions.[4]

Moreover, under California's laissez-faire policy, when farm workers came under union contract, employers were free to choose the union without regard for the workers' preference.[5]

The State's common-law imposed no restrictions upon union security agreements that private parties negotiated. Open shops--where

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2. Agricultural Labor Relations Bd. v. Superior Court 16 Cal.3d 392 (1976).

3. Legal Problems of Agricultural Labor, II Univ.Cal. L.Rev. (1970) at 39-46 and 113-171.

4. Shatz, "Picketing Injunctions in California: A Story of Farm Labor Disputes", 28 Hastings L.J. 801 (1977).

5. Englund v. Chavez, 8 Cal.3d 572 (1972).

union membership may not be compelled, union shops--where membership is required within a time certain of obtaining employment, and closed shops[6]--where union membership is a prerequisite to obtaining employment[7], were equally acceptable[8]. Indeed, workers could be compelled to join the union that contracted with their employer even if it represented none of the bargaining unit workers; and employers were under no legal compulsion to bargain with a union even if it represented one-hundred percent of the workers.[9]

Workers' struggle to unionize under such circumstances produced strikes, boycotts, and public clamor for legislation to protect farm

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6. California's common law, however, has long prohibited unions from arbitrary and invidious discrimination as to who is admitted to membership. James v. Marinship Corp., 25 Cal.3d 721, 740-741.

7. Grodin & Beeson, "State Right to Work Laws and Federal Labor Policy" 52 Cal.L.Rev. 95, 97 (1964).

8. Englund v. Chavez, supra., at 8 Cal.3d 596.

9. Ibid.

workers from employer abuses.[10/]

The California Legislature responded in 1975 by enacting the Agricultural Labor Relations Act (ALRA or Act)[11/] which expressly recognized the "economic dislocation and social injustice" under which farm workers labored, and the "presently unstable and potentially volatile condition in the state".[12/]

The Act follows the federal model in many respects, but deviates from the NLRA in many particulars in response to the exigencies of California agriculture as well as the historical problems the Legislature addressed. Elections, for example, must be conducted within seven days of the workers' petition seeking to voice their representative choice, and within forty-eight hours if a strike is in progress.

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10. Hyink, Issues and California Politics and Government, Crowell Co., New York (1977) at 8.

11. California Labor Code §1140 et. seq.. Hereinafter all statutory references are to the California Labor Code unless otherwise indicated.

12. Stats. 1975, Third Ex.Sess.,ch1,§1, No. 3 West's Cal. Legis. Service, p.304,no.2, Deering's Adv. Legis. Service, p. 1147.

13. Section 1156.3(a).

Elections are conducted by the Agricultural Labor Relations Board (ALRB or Board) upon a petition filed at a seasonal peak in employment by a majority of the workforce (§1156.3-1156.4). Those deviations from the federal model respond to California agricultural's migrant and seasonal employment patterns without sacrificing the State's policy to maximize seasonal workers' enjoyment of statutory rights (§1156.4) and, generally, to "encourage and protect" farm workers' exercise of rights to unionize (§1140.2).

The Legislature also elected to deviate from the federal model regarding union security agreements. The framers expressly rejected an amendment to adopt NLRA §8(a)(3) language which exempts employers' compliance with union security contracts which condition continued employment upon payment of periodic dues and assessments from the NLRA's unfair labor practice prohibition against employer discrimination to encourage or discourage union activity. (29 U.S.C.§158(a)(3).) Instead, the Legislature

drafted §1152--which describes employees' rights, §1153(c)--which proscribes employer discrimination on the basis of union activity, and §1154(b)--which proscribes such discrimination by unions, so that pre-Act State law was not disturbed. Section 1152 affirmatively provides farm workers self-organization, collective bargaining, and concerted activity "for mutual aid or protection" rights, and affords a less expansive "right to refrain" from such activities. Rather than a parallel right to refrain from statutorily protected employee activities, the Legislature granted a right to refrain

> "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153".

Similarly, in §1153(c), the Legislature expressly exempted union security agreements that were permissible under pre-Act law from nullification by the ALRA when it excepted employer compliance with such union security agreements from that subdivision's prohibition

against discrimination to encourage or discourage union membership.

> "Nothing in this part, or in any other statute of this state, shall preclude an agricultural employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this section as an unfair labor practice) to require as a condition of employment, membership therein . . . if such labor organization is the representative of the agricultural employees . . . . (M)embership shall mean the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided, that such membership shall not be denied or terminated except in compliance with a constitution or bylaws which afford full and fair rights to speech, assembly, and equal voting and membership priviliges for all members, and which contain adequate procedures to assure due process to members and applicants for membership."

(§1153(c); emphasis added.)

Section 1154(b), the subdivision prohibiting union discrimination, includes a parallel exception reflecting the Legislature's decision to abstain from modifying pre-Act State law regarding union security agreements:

> "It shall be an unfair labor practice for a labor organization . . . to cause or attempt to cause an agricultural employer to discriminate against an employee in violation of subdivision (c) of Section 1153, or to discriminate against an employee with respect to whom membership

> in such organization has been denied or terminated for reasons other than failure to satisfy the membership requirements specified in subdivision (c) of Section 1153."

Thus, while the Act assures workers' unfettered right to form, join and assist unions and outlawed discriminatory reprisals, it did not assure an equally broad right to refrain from engaging in union activity. Instead, the Legislature carefully exempted prior law--which permitted the full range of union security agreements--from the Act's reach.[14/]

In addition, however, the Legislature codified pre-Act common-law barring arbitrary invidious discrimination, and statutorily assured members and applicants both substantive and procedural due process and equal protection It required that membership be conditioned only upon "reasonable terms and conditions uniformly

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14. Appellant's characterization of §1152 as granting rights and thereafter withdrawing them and his parallel claim that such a withdrawal constitutes state action for Fourteenth Amendment purposes misconstrues the legislative process. Rather than conferring a quantum of rights and subsequently withdrawing a portion thereof, the Legislature limited, at the outset, the body of rights conferred.

applicable to other members in good standing", and that membership be neither terminated nor denied except in compliance with "full and fair rights to speech, assembly, and equal voting and membership priviliges" as well as with procedural due process requirements.[15/] (§1153(c).)

Appellant's employer and the UFW agreed to a union shop union security agreement in each of their successive collective bargaining agreements. Upon the termination of one such Agreement, and prior to reaching a succeeding Agreement, the UFW engaged in a strike. Appellant crossed the Union's picket lines and broke the strike in contravention of the UFW's rule prohibiting its members from breaking its strikes. A Union member filed charges against Appellant, and she was tried and convicted of

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15. Such speech, association, and due process protections as well as the State's prohibition against arbitrary and invidious discrimination in union membership, have their origins in California's common-law which mirrors certain federal protections. See, e.g. DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139 (1947); Cason v. Glass Bottle Blowers Assn., 37 Cal.2d 134 (1951); and Holderby v. Operating Engineers, 45 Cal.2d 843 (1955).

strike breaking. She was expelled from good standing in the Union, but appealed to the UFW's National Executive Board pursuant to the Union's Constitution. When her appeal was rejected as untimely, Appellant was notified of her further appeal rights to the Public Review Board but she delined to pursue that internal Union remedy. Instead, she filed an unfair labor practice charge.

Meanwhile, the UFW notified Appellant's employer, who was by then a signatory to a renewed collective bargaining agreement with a union shop provision, of Appellant's loss of good standing. The employer voluntarily complied with the union security agreement by discharging Navarro.

The Board, however, concluded that there were procedural infirmities in the Union's expulsion of Appellant from membership, and ordered the UFW to return her to good standing, to accomplish her reinstatement, and to make her whole for economic losses she suffered as a result of the union discipline imposed.

In spite of the fact that she was not aggrieved by the ALRB's final order, Appellant petitioned the Court of Appeal for review of the Board's Decision and challenged the constitutionality of §1153(c).

The California Court of Appeal, First Appellate District, Division Two, affirmed the Board's Decision in all relevant respects, and as to the constitutional challenge, concluded that no state action was involved to trigger application of the Fourteenth Amendment.

ARGUMENT

THE CALIFORNIA LEGISLATURE'S FAILURE TO PROHIBIT UNION SECURITY AGREEMENTS THAT PRE-ACT STATE LAW PERMITTED CONSTITUTES "STATE INACTION", RATHER THAN THE SORT OF "STATE ACTION" REQUIRED TO TRIGGER CONSTITUTIONAL SCRUTINY.

Appellant purports to rely upon this Court's Shelley v. Kraemer, 334 U.S. 1 (1948) opinion as support for his claim that state

action as contemplated by the Fourteenth Amendment is present here. The Shelley opinion, however, defeats that claim. There, the Court addressed restrictive covenants compelling arbitrary and invidious racial discrimination in housing. The lower court's judgment enforced the covenant and, thereby, the discrimination. This Court said:

> "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are affectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated...." (344 U.S. 1,13; emphasis added.)

It was the judicial enforcement of the restrictive covenants that followed the private individuals' refusal to voluntarily comply that constituted state action in Shelley. The Court made it quite clear that state inaction would not trigger constitutional scrutiny when the Court said:

> "These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the States

> have made available to such individuals the full coercive power of government to deny to petitioners, on the basis of race or color, the enjoyment of property rights . . . . The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." (344 U.S. 1,19; emphasis added.)

See also, Barrows v. Jackson 346 U.S. 249 (1953) regarding California's refusal to enforce such covenants in an action for damages. This Court approved the California Supreme Court's conclusion that such judicial enforcement would contravene the Fourteenth Amendment but noted that "voluntary adherence would constitute individual action only". 346 U.S. at 253.

Similarly, in Mulkey v. Reitman, 64 Cal. 2d 529 (1966) the California Supreme Court opined that

> "However subtle may be the state conduct which is deemed 'significant', it must nevertheless constitute action rather than inaction. The ... Fourteenth Amendment is prohibitory in nature (and does not) impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act. (64 Cal.2d 537-538.)

And, in a related case, this Court affirmed the California Supreme Court's conclusion that the "State was permitted a neutral position with respect to private racial discriminations and that the State was not bound by the Federal Constitution to forbid them". Reitman v. Mulkey, 387 U.S. 369 (1967), at 387 U.S. 374.

The union security Agreement at issue here was manifestly not enforced by the State. Neither the Board nor the reviewing Court engaged in any conduct even remotely resembling enforcement. Rather, the parties to the Agreement voluntarily complied with its terms. Nor is the ALRB empowered to enforce union security agreements. It is statutorily authorized to act only when an unfair labor practice charge is filed and then only to determine whether an unfair labor practice has been committed (§1160.3.) insofar as its functions relate to the case at bench. The only unfair labor practice prohibitions related to union security matters are §§1153(c) and 1154(b). Thus, in the union security realm, the Board could only

find one of two things: (1) that no unfair labor practice was committed, or (2) that an unfair labor practice was committed by an employer, a union, or both. The former would certainly not constitute enforcement of a union security agreement; and in the latter circumstance, the Board is only empowered to restrain the Agreement's enforcement (§1160.3).

Nor could the Union file an unfair labor practice charge and thereby engender Board enforcement of its Agreement with an employer who refused to voluntarily comply with contract terms such as a union security provision. Contract violations in and of themselves do not constitute unfair labor practices. Textile Workers Union v. Lincoln Mills 353 U.S. 448, 452 (1957); Mine Workers v. N.L.R.B., 257 F.2d 211, 214-215.

Nor, of course, does the present case present a justiciable controversy[16/] surrounding enforcement of a union security provision. Here,

16. Thus, addressing a state enforcement question would be in the nature of an advisory opinion and therefore impermissible. Flast v. Cohen, 392 U.S. 83,

the parties voluntarily complied with the union security agreement's terms.

The Railway Employees' Department v. Hanson, 351 U.S. 225 (1955) line of cases, similarly, provides no basis for concluding that state action is present here. In Hanson the Railway Labor Act (RLA) §2 Eleventh expressly superseded contrary state law. The case arose out of Nebraska. The State Constitution prohibited union shop union security agreements, but was superseded by the RLA provision permitting such union security devices. This Court said:

> "The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads so far as those 17 (right to work) states are concerned for without it such contracts could not be enforced therein.' (Citations) We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." (351 U.S. 232.)

The California Legislature's enactment of §1153(c) had no similar impact. Prior to the enactment, unions were free to enter into

any type of union security agreement that they could persuade an employer to sign, and they were not even faced with a prerequisite of showing majority employee support. Englund v. Chavez, supra., at 8 Cal.3d 597. The private right to avoid compulsory unionism that Nebraska's citizens "enjoyed" prior to "congressional invasion" through RLA §2 Eleventh did not exist in California before 1975 (Colgate Palmolive Co. v. NLRB (1950) 338 U.S. 355) and does not exist here now. The fact that union shop agreements were permitted prior to §1153(c)'s enactment and are still permitted under its terms does not constitute governmental invasion of private rights.

Indeed, in Wicks v. Southern Pacific Co. 121 F.Supp. 454 (1953), aff'd, 231 F.2d 130 (9th Cir. 1956), and in Otten v. Baltimore 205 F.2d 58, a similar situation arose when union security provisions were challenged. The agreements also involved RLA §2 Eleventh, but arose in California and New York, respectively. Neither States' law prohibited union shops.

In both instances, the Courts found that there was no congressional invasion of private rights. The RLA altered nothing in either situation. Justice Learned Hand, writing for the Otten Court, and quoted in Wicks, said:

> "We cannot understand how the subsection can be regarded as conferring validity on the agreement; since all it does is exempt it from nullification by other statutes or laws". (Wicks, supra., quot- from Otten, at 231 F.2d ___, 37 LRRM 2725, 2729.)

That is precisely what §§1153(c) and 1154(b) do, here. Absent the provisos in those subsections, the Legislature's 1975 enactment of §1152-1154 would have substantially altered prior California law with respect to union security. Including those provisos, however, resulted in State law remaining unchanged with respect to the form(s) of union security that private parties may permissibly negotiate. The California Legislature abstained from such modification of State law, and opted instead to retain its pre-Act neutrality described in Englund v. Chavez, supra., as well as in Gabaldon v. United Farm Workers Organizing Com-

mittee, 35 Cal.App.2d 757 (1973) and Mendoza v. United Farm Workers Organizing Committee 487 F.2d 311 (9th Cir. 1973), cert. denied 415 U.S. 918.

A number of federal courts have reached a similar conclusion in litigation involving the NLRA which, unlike RLA §2 Eleventh, expressly does not supersede state right to work laws with its 29 U.S.C.§158(a)(3) union security proviso permitting a limited form of union shop (29 U.S.C.§164(b).) In Kolinske v. Lubbers, 712 F.2d 471 (D.C.Cir. 1983), the Court concluded that the NLRA's union security proviso is neutral in its impact upon pre-existing private rights to avoid compulsory unionism. (712 F.2d ___, 113 LRRM 2957,2962.) Similarly, in Reid v. McDonnel Douglas Corp., 443 F.2d 408 (10 Cir. 1971) the Court concluded that the NLRA, unlike the RLA, did not "insinuate itself into the decision of a union and an employer to agree to a union security clause so as to make that choice governmental action for purposes of the First and Fifth Amendment".

(443 F.2d 410-411, 77 LRRM 2609,2611.)

The First Circuit reached a similar conclusion in Hovan v. Carpenters, 703 F.2d 571 (1st Cir. 1983) and questioned whether state action has been too "liberally" found in labor cases. The Hovan Court also questioned whether constitutionalizing "union actions may bring about extensive change in our economic and political systems and not necessarily for the better".

In any event, the California Legislature's decision to refrain from altering prior State law's neutrality toward union security provisions certainly presents no governmental invasion of private rights. Rather, it constitutes the epitomy of state inaction.

Accordingly, the instant appeal should be dismissed for want of a substantial federal question.

CONCLUSION

California's response to the economic dislocation and social injustice suffered by

its farm worker citizens and residents sought to alleviate historically entrenched injustice that left individual workers powerless to deal efficaciously with their far more powerful employers. Toward that end the State borrowed from the federal model but also added unique provisions expressly designed to address the exigencies of California agriculture's migrant and seasonal employment patterns as well as the nascent developmental stage of the State's agricultural unions. With respect to union security, the Legislature chose to leave its prior neutrality unaltered, much as Congress addressed the issue in its 1935 enactment of the original NLRA, rather than adopting the more restrictive Taft-Hartley Amendment (61 Stat. 136 (1947), §8(a)(3).) that is presently 29 U.S.C.§158(a)(3). That policy choice was surely the State's to make, and just as surely constitutes state inaction rather than the sort of governmental invasion of pre-existing private rights that triggers application of the Fourteenth Amendment.

On that basis alone, the instant appeal should be dismissed.

Furthermore, the foregoing issue as well as each issue before it was correctly stated and decided by the California Court of Appeal, First Appellate District, Division Two. The State Court's scholarly opinion reflects a thorough analysis of the Legislature's intent as well as of the legal questions presented for the Court's decision. The State Court's opinion should therefore be affirmed and the appeal dismissed.

Appellee UFW therefore respectfully urges this honorable Court to dismiss the appeal for want of a substantial federal question and, thereby, to affirm the opinion below.

Dated: 7 December 1984

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